

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GAVRIELI BRANDS, LLC,)
)
 Plaintiff,)
) C.A. No. 18-462 (MN)
 v.)
)
 SOTO MASSINI (USA) CORP., et al.,)
)
 Defendants.)

Tuesday, April 16, 2019
8:27 a.m.
Pretrial Hearing

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

MORGAN LEWIS & BOCKIUS, LLP
BY: AMY MICHELE DUDASH, ESQ.
BY: AHREN C. HSU-HOFFMAN, ESQ.
BY: MICHAEL J. LYONS, ESQ.
BY: EHSUN FORGHANY, ESQ.

Counsel for the Plaintiffs

1 APPEARANCES CONTINUED:

2
3
4 STAMOULIS & WEINBLATT, LLC
5 BY: STAMATIOS STAMOULIS, ESQ.

6 -and-

7 SML AVVOCATI, P.C.
8 BY: STEPHEN M. LOBBIN, ESQ.

9 Counsel for the Defendants

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12 P R O C E E D I N G S

13 (REPORTER'S NOTE: The following hearing was
14 held in open court, beginning at 8:27 a.m.)
15
16

08:22:50 17

08:27:50 18 THE COURT: Good morning. Please be seated.

08:27:52 19 Let's start with some introductions.

08:27:55 20 MS. DUDASH: Good morning, Your Honor. Amy

08:27:59 21 Dudash from Morgan Lewis for plaintiff, Gavrieli Brands,

08:28:03 22 LLC. And with me today is Michael Lyons, Ahren Hsu-Hoffman,

08:28:08 23 and Eshun Forghany.

08:28:12 24 THE COURT: Good morning.

08:28:13 25 Mr. Stamoulis.

08:28:15 1 MR. STAMOULIS: Good morning, Your Honor. Stam
08:28:17 2 Stamoulis on behalf of the defendants, Soto Massini. With
08:28:21 3 me today is Stephen Lobbin and also Thomas Pichler, the
08:28:26 4 president and CEO of Soto Massini.

08:28:29 5 THE COURT: Okay. We are here today for the
08:28:31 6 pretrial conference. We have a number of issues to go
08:28:34 7 through and I have to be out of here by 10:30, so I thought
08:28:38 8 we would just start with some of the issues that I have
08:28:44 9 reviewed and am going to rule on now. And then we'll go
08:28:49 10 through the pretrial order and some of the motions in limine
08:28:53 11 where I would like to hear some more argument.

08:28:56 12 First we have the motion to dismiss the
08:29:01 13 counterclaims and affirmative defenses in Soto Massini USA
08:29:08 14 Corps counterclaims. And I am going to grant the motion
08:29:13 15 with respect to the fifth and sixth counterclaims which go
08:29:17 16 to false advertising under the Lanham Act and false
08:29:21 17 advertising under the California Business and Professional
08:29:25 18 Code.

08:29:25 19 To plead a claim for false advertising under the
08:29:28 20 Lanham Act, a plaintiff must allege that the defendant made
08:29:31 21 a false or misleading statement. The Ninth Circuit has
08:29:35 22 recognized that a claim for false advertising under Section
08:29:38 23 17500 of the California Business and Professional Code is
08:29:42 24 substantially congruent to a claim for false advertising
08:29:45 25 under the Lanham Act.

08:29:47 1 Here Soto USA asserts that Gavrieli made false
08:29:53 2 statements to Kickstarter and Indiegogo.

08:29:57 3 Soto USA alleges that Gavrieli "intentionally
08:30:02 4 misled Kickstarter and Indiegogo" and that "Gavrieli
08:30:06 5 continued to make false statements to Kickstarter and
08:30:10 6 Indiegogo." These are unsupported conclusions without any
08:30:13 7 underlying facts pleaded, such as what false statements were
08:30:17 8 made and what was done to mislead. The Court is not
08:30:20 9 obligated to accept unsupported conclusions as true, and
08:30:26 10 Soto USA has failed to plead that Gavrieli made false or
08:30:30 11 misleading statements in a plausible way.

08:30:31 12 The Court also finds that Soto USA's allegation
08:30:35 13 that "Gavrieli told Kickstarter and Indiegogo that Soto USA
08:30:40 14 was infringing upon the asserted patents and Gavrieli's
08:30:44 15 trade dress" is insufficient to state a claim because these
08:30:48 16 alleged statements are protected by California's litigation
08:30:51 17 privilege. And for that I'm relying on *eCash Technologies,*
08:30:56 18 *Inc. versus Guagliardo*, 127 F. Supp. 2d 1068, 1082 in the
08:31:04 19 Central District of California.

08:31:07 20 California's litigation privilege extends to
08:31:09 21 communications "with some relation to judicial proceedings,"
08:31:14 22 including communications with third parties. Thus,
08:31:16 23 Gavrieli's alleged statements to Kickstarter and Indiegogo
08:31:20 24 fall under this privilege.

08:31:23 25 Additionally, Soto USA asserts that Gavrieli

08:31:25 1 falsely advertised by describing its Tieks brand flats as
08:31:30 2 being made with "Italian leather."

08:31:32 3 That description is not actually false because
08:31:35 4 Gavrieli's Tieks brand flats are made with Italian leather.

08:31:39 5 Soto USA's argument that this description
08:31:41 6 without disclosing the origin of manufacture is likely to
08:31:45 7 evoke specific geographical associations with Italy and
08:31:51 8 imply that the entire product is manufactured in Italy is
08:31:54 9 unpersuasive.

08:31:55 10 There is no duty under the Lanham Act to
08:31:58 11 disclose and a plaintiff's claim cannot be based on the
08:32:00 12 defendant's failure to disclose a fact.

08:32:03 13 Third, the Court finds that Gavrieli's
08:32:10 14 statements regarding Tieks brand flats unique split-sole and
08:32:14 15 flexible midsole and unparalleled comfort, flexibility,
08:32:18 16 durability, and style are nonactionable puffery.

08:32:22 17 Words constitute puffery if they are not
08:32:26 18 specific or measurable. Words like "unique," "flexible,"
08:32:29 19 and "unparalleled" are not measurable, and Gavrieli's
08:32:32 20 statements consist of puffery and are thus non-actionable
08:32:37 21 for false advertising.

08:32:39 22 So because Soto USA failed to plead a claim for
08:32:43 23 false advertising under the Lanham Act, its Fifth
08:32:47 24 Counterclaim is dismissed. And for the same reasons its
08:32:50 25 Sixth Counterclaim is dismissed.

08:32:51 1 The Seventh Counterclaim is unfair competition
08:32:55 2 under the California Business and Professional Code, Section
08:32:58 3 17200.

08:32:58 4 The Ninth Circuit has held that a "business act
08:33:01 5 or practice may violate the UCL if it is either unlawful,
08:33:08 6 unfair or fraudulent." That is the Rubio versus Capital One
08:33:12 7 Bank case, 613 F.3d 1195 at 1204 in the Ninth Circuit.

08:33:19 8 To adequately plead a claim for unfair
08:33:22 9 competition, a plaintiff must specify which of the alleged
08:33:24 10 practices is unfair, which is unlawful, and which is
08:33:27 11 fraudulent.

08:33:28 12 Here, Soto USA pleads generally that Gavrieli's
08:33:32 13 wrongful conduct alleged herein constitutes an unlawful,
08:33:37 14 fraudulent, and/or unfair act or practice.

08:33:39 15 The Court finds that this allegation is
08:33:41 16 insufficient because it fails to specify which acts Soto USA
08:33:45 17 is complaining of and which acts it contends are unlawful
08:33:49 18 versus which acts are fraudulent versus which acts may be
08:33:53 19 unfair.

08:33:55 20 Therefore, Soto USA's Seventh Counterclaim is
08:33:57 21 dismissed.

08:33:58 22 The Eighth Counterclaim: Intentional
08:34:01 23 Interference With Contractual Relations Under California
08:34:05 24 Law.

08:34:05 25 Under California law, to plead a claim for

08:34:07 1 intentional interference with contractual relations, a
08:34:11 2 plaintiff must plead a valid contract between itself and a
08:34:14 3 third party, that the defendant knew of the contract, and
08:34:17 4 that the defendant intentionally tried to disrupt the
08:34:20 5 contract. A plaintiff must also plead that there was an
08:34:23 6 actual disruption of the contract that resulted in damages.
08:34:28 7 I'm relying there on *Nygard, Inc. versus Uusi-Kerttula*, 159
08:34:36 8 Cal. App. 4th 1027 at 1047.

08:34:37 9 Here, Soto USA fails to plead that there were
08:34:42 10 valid contracts between itself and Kickstarter or itself and
08:34:46 11 Indiegogo.

08:34:47 12 Soto USA argues that it has pleaded a valid
08:34:50 13 contract because it alleges that it had contracts with both
08:34:53 14 Kickstarter and Indiegogo "per the terms of service" of each
08:34:58 15 company.

08:35:00 16 This allegation, however, without supporting
08:35:02 17 facts that describe the substance of the contracts, is an
08:35:05 18 unsupported conclusion that the Court is not obligated to
08:35:08 19 accept as true in a motion to dismiss.

08:35:10 20 Moreover, the Court finds that even if Soto USA
08:35:14 21 had adequately pleaded the existence of valid contracts with
08:35:17 22 Kickstarter and Indiegogo, Gavrieli's alleged statements to
08:35:21 23 Kickstarter and Indiegogo are protected as I said before by
08:35:25 24 California's litigation privilege.

08:35:27 25 So because Soto USA has failed to plead a claim

for intentional interference with contractual relations, its Eighth Counterclaim is dismissed.

The Ninth Counterclaim, Intentional Interference With Prospective Economic Relations Under California Law.

Under California law, to plead intentional interference with prospective economic relations, a plaintiff must plead that an economic relationship existed between itself and a third party, that the defendant had knowledge of the relationship, that the defendant acted intentionally to disrupt the relationship, and that an actual disruption of the relationship occurred. And I guess fourth, that the plaintiff suffered economic harm because of the disruption.

For that I'm relying on *CRST Van Expedited, Inc. versus Werner Enterprises*, 479 F.3d 1099 from the Ninth Circuit.

The Ninth Circuit has held that a plaintiff must also "allege an act that is wrongful independent of the interference itself." For that, citing the same case.

Here, Soto USA fails to plead that Gavrieli engaged in an act that was wrongful independent of the interference itself.

Moreover, even if Soto USA did plead that Gavrieli engaged in an independently wrongful act, the Court finds that Soto USA fails to plead that an actual disruption

08:36:50 1 occurred.

08:36:52 2 Soto USA's allegation that its relationships
08:36:54 3 with Kickstarter and Indiegogo "were disrupted as a result
08:36:58 4 of Gavrieli's conduct and Soto USA was harmed thereby" is an
08:37:03 5 unsupported conclusion that the Court does not need to
08:37:07 6 accept as true and is not adequately supported by facts.
08:37:11 7 Therefore, Soto USA's Ninth Counterclaim is dismissed.

08:37:15 8 Under California law, the Tenth Counterclaim,
08:37:21 9 Trade Liabile, to prove trade liable, a plaintiff must plead
08:37:24 10 that the defendant made a false, disparaging statement to a
08:37:28 11 third party. The plaintiff must also plead special damages.
08:37:30 12 And for that I'm relying on *New.net, Inc. versus Lavasoft*,
08:37:36 13 356 F. Supp. 2d 1090 at 1113 from the Central District of
08:37:42 14 California.

08:37:42 15 Even when viewing the allegations in the light
08:37:46 16 most favorable to Soto USA here, Soto USA has failed to
08:37:49 17 adequately plead a claim for trade libel.

08:37:53 18 First, Soto USA has failed to adequately plead
08:37:58 19 that Gavrieli made a false, disparaging statement to a third
08:38:01 20 party.

08:38:01 21 Courts in California have held that a plaintiff
08:38:04 22 must allege facts regarding the allegedly libelous
08:38:08 23 statement, such as to whom the statements were made to, the
08:38:11 24 substance of the statements, and when the statements were
08:38:14 25 made, to adequately plead a claim for trade libel.

Here, although Soto USA pleads that Gavrieli made statements to "third parties," Soto USA fails to plead any other necessary facts, such as the substance of the statements, when the statements were made, or where, et cetera. Therefore, the Court does not have to accept these unsupported conclusions. There is no specific facts, and Soto USA has failed to adequately plead that Gavrieli made libelous statements.

The Court also finds that Soto USA failed to plead special damages for trade libel. Under Rule 9(g), special damages must be specifically stated.

The Court finds that Soto USA's allegation that it "suffered direct financial harm" is insufficient under Rule 9(g)'s requirement to specifically state the alleged harm.

And the Tenth Counterclaim is therefore dismissed.

With respect to Soto USA's request for leave to amend its Fifth through Tenth counterclaims, I'm going to deny that request.

The Court finds that granting leave to amend would be futile. Soto USA was on notice of the deficiencies in its counterclaims when Gavrieli moved to dismiss Soto USA's First Amended Counterclaims.

Soto USA has already had the opportunity to

08:39:40 1 amend and failed to cure these deficiencies in its Second
08:39:44 2 Amended Answer and Counterclaim.

08:39:46 3 And while it's not relevant to the motion to
08:39:48 4 dismiss, I note that the interrogatory responses given with
08:39:52 5 respect to these counterclaims also offered no specifics, no
08:39:57 6 facts, and indeed no evidence to support the claims. There
08:40:01 7 was just those references to unspecified documents under
08:40:05 8 Rule 33.

08:40:06 9 So Soto USA's request to amend is denied.

08:40:10 10 With respect to Gavrieli's motion to strike the
08:40:15 11 appended affirmative defenses, I'm going to deny that
08:40:19 12 motion. Soto USA affirmative defenses are identical to the
08:40:22 13 affirmative defenses that have been asserted by the
08:40:25 14 defendant, Thomas Pichler, in his answer. Gavrieli, while
08:40:30 15 they reserve the right to at some point move to strike
08:40:34 16 Mr. Pichler's affirmative defenses as untimely, there is no
08:40:38 17 motion before me and with two weeks before trial such a
08:40:42 18 motion may be untimely, therefore, the issues in those
08:40:45 19 affirmative counterclaims will likely be before the Court
08:40:49 20 and I'm not going to strike them with respect to Soto USA.

08:40:54 21 Any questions? Okay.

08:41:03 22 Now I wanted to talk -- I guess the next motion
08:41:08 23 is the motion for sanctions. I have reviewed the papers,
08:41:15 24 and I do continue to have serious concerns about the
08:41:18 25 defendant's discovery efforts in this case. Mr. Pichler put

in a declaration in his response, and I see that he is going to testify at the upcoming trial. I suspect that the issue of the production in the discovery and the truth of certain statements that he made is going to be further explored at trial. And I would like to see what happens there and get more of an understanding as to the issues and be able to make some credibility assessments.

So what I'm going to do right now is deny the motion, but I will give the plaintiff leave to renew it orally if you chose after Mr. Pichler testifies and I have the ability to make the determinations that I think I need to make.

Any questions on that? Okay.

Now I wanted to talk about the motions in limine. Plaintiff has submitted three motions in limine. For number one, number two, I would like to hear a little bit from the parties. With respect to number three, plaintiff's motion in limine to preclude defendants from mentioning unrelated legal proceedings involving Mr. Kfir Gavrieli, I am going to grant that motion.

The other litigation is a business dispute in California between Mr. Gavrieli and certain family members. Defendant has made no showing of relevance saying only that someone might open a door and make it relevant or that it might be admissible under Rules 601 or 608, but in their

08:43:00 1 papers provide no explanation of how that could be so.

08:43:03 2 Moreover, the discussion about the proceedings
08:43:05 3 is likely to confuse the jury and be prejudicial to the
08:43:09 4 plaintiff. In the absence of any showing of relevance that
08:43:13 5 we have here and the real potential for prejudice, mention
08:43:16 6 or discussion of other evidence regarding the California
08:43:19 7 litigation will not be coming in.

08:43:22 8 Anything there?

08:43:24 9 MR. LOBBIN: Your Honor, if I may, just a point
08:43:27 10 of clarification. If the witness testifies at trial in some
08:43:33 11 unprovoked manner or something about how the litigation
08:43:37 12 might have some relevance, I assume that we're permitted to
08:43:41 13 cross-examine on that point?

08:43:42 14 THE COURT: You are. If you think that someone
08:43:43 15 has opened the door, what I would like you to do is to tell
08:43:48 16 me before you just decide for yourself that the door has
08:43:51 17 been opened. We will discuss it and if it's true that the
08:43:54 18 door has been opened, yes, then you may ask questions.

08:43:58 19 MR. LOBBIN: I don't recall whether I
08:43:59 20 specifically said in our opposition or our response to the
08:44:02 21 motion, but just for the Court's clarity, we have no plans
08:44:07 22 to raise -- I know nothing about the other litigation, so we
08:44:12 23 have no plans to raise it anyway.

08:44:15 24 THE COURT: Okay. I guess if you guys had
08:44:18 25 talked about that, you could have saved me a minute or two

08:44:21 1 in reading that.

08:44:22 2 Let's go to plaintiff's motion in limine number
08:44:24 3 two, which is to precluded defendants from using prior art
08:44:28 4 not identified in invalidity contentions or corroborated as
08:44:34 5 prior art. I have reviewed the submission by the
08:44:38 6 defendants. Now I would like to hear from plaintiffs in
08:44:41 7 response to the submission what, if anything, is still being
08:44:47 8 objected to in terms of disclosure. I understand that there
08:44:50 9 are essentially two issues here, one is kind of the art
08:44:53 10 itself and whether it was disclosed properly and then there
08:44:57 11 is also the issue of corroboration. First I would like to
08:45:01 12 take the disclosure issue.

08:45:06 13 MR. HSU-HOFFMAN: Good morning. Ahren
08:45:10 14 Hsu-Hoffman on behalf of plaintiff Gavrieli. In defendant's
08:45:13 15 response to the motion in limine number two, they made it
08:45:18 16 clear that they're intending to have Mr. Pichler and his
08:45:22 17 wife testify about, "many prior art shoe designs discussed
08:45:30 18 throughout this case." To me that suggest they're going to
08:45:33 19 get up on the stand and feel free to talk about any shoes
08:45:39 20 that have at any point come up in this case. That mostly
08:45:44 21 includes --

08:45:44 22 THE COURT: Wait one second. That's not the way
08:45:46 23 I read defendant's submission. Is that what you meant in
08:45:49 24 the submission?

08:45:50 25 MR. LOBBIN: I'm unclear on what he means, but

08:45:52 1 no, based on what he just said, no.

08:45:56 2 MR. HSU-HOFFMAN: I'm quoting from the first
08:45:58 3 sentence.

08:45:58 4 THE COURT: I understand. But then they went on
08:46:01 5 for pages and pages to identify specific pieces of prior art
08:46:04 6 that they apparently intend to rely on. So what I need to
08:46:07 7 know from you is not just a general complaint, what in what
08:46:11 8 they said that they were going to rely on of those exhibits
08:46:14 9 are you saying was not properly disclosed?

08:46:17 10 MR. HSU-HOFFMAN: In their response to this
08:46:21 11 Court last week, they identified 60, approximately 69 what
08:46:25 12 they contend to be invalidating pieces of prior art. Now,
08:46:31 13 not all of those references were identified in their
08:46:35 14 invalidity contentions. The invalidity contentions --

08:46:40 15 THE COURT: Which ones? I'm trying to help you
08:46:42 16 out here and figure out what you want me to say they can't
08:46:45 17 do, because otherwise we'll have a trial where nobody knows
08:46:50 18 what's coming in. So what references -- they in their
08:46:54 19 invalidity contentions relied on Tieks for anticipation,
08:46:58 20 Tieks first edition, and then Tieks in combination with
08:47:02 21 three patents for obviousness. So what in what they have
08:47:06 22 said they now intend to rely on was not disclosed?

08:47:11 23 MR. HSU-HOFFMAN: I have marked each exhibit
08:47:14 24 that wasn't referenced in the invalidity contentions with an
08:47:16 25 X. I'm prepared to read that into the record, Your Honor,

08:47:19 1 if that would be helpful.

08:47:20 2 THE COURT: I think I need to know which ones,
08:47:22 3 and they need to know which ones you're saying weren't
08:47:26 4 disclosed and why based on what they said where they were
08:47:30 5 disclosed they shouldn't come in.

08:47:33 6 MR. HSU-HOFFMAN: Absolutely. This would
08:47:35 7 include DTX-1. I'm reading the ones that were not
08:47:39 8 disclosed. DTX-2. DTX-3. DTX-4. DTX-6. DTX-9. DTX-10.
08:47:49 9 DTX-12. DTX-14. DTX-16. DTX-18. DTX-24. DTX-28.
08:48:02 10 DTX-29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42,
08:48:15 11 43, 44, 45, 46.

08:48:18 12 THE COURT: You can just group them if you want.

08:48:20 13 MR. HSU-HOFFMAN: I'm trying make making sure I
08:48:23 14 don't skip one that wasn't in there. This would go all the
08:48:27 15 way from 38 to DTX -- I'm sorry, they have numbering on
08:48:36 16 here, so it doesn't always go in the correct order. So if I
08:48:42 17 go back, DTX-42 through DTX-60, DTX-61, DTX-66, DTX-70,
08:49:05 18 DTX-84, 85, 87, 88, 21, 22, 23, and 25.

08:49:26 19 THE COURT: Now, when you say they were not
08:49:29 20 disclosed, do you mean obviously they have been disclosed
08:49:33 21 because they're in the pretrial order? So when was the
08:49:36 22 first time that you understood that these proposed exhibits
08:49:43 23 were going to be relied on?

08:49:45 24 MR. HSU-HOFFMAN: Well, this notice would be
08:49:49 25 that first time. The invalidity contentions identified

08:49:55 1 specific image files, 24 image JPEG image files. Those were
08:50:00 2 what we were on notice of in addition to the three patents
08:50:04 3 that they have identified for their obviousness contentions.

08:50:07 4 Now this list of art that they have identified
08:50:12 5 as invalidating art is somewhat confusing because it
08:50:16 6 encompasses things that aren't prior art such as things like
08:50:22 7 website source code, it just doesn't look to be a list of
08:50:26 8 art that you would submit and tell the Court you were
08:50:29 9 relying on for validity purposes. So I think there is
08:50:33 10 possibly an intention that they're not going to rely --
08:50:36 11 they're not asserting each of these as an anticipation
08:50:40 12 reference, but according to the disclosure, that's what
08:50:43 13 they're intending to do.

08:50:45 14 What they did disclose were the JPEG image
08:50:48 15 files.

08:50:49 16 THE COURT: Those are the 24 files.

08:50:51 17 MR. HSU-HOFFMAN: Those are the 24 files. The
08:50:54 18 problem we see with those files is that there is not a
08:50:57 19 percipient witness. And I'm going to the part of their
08:51:02 20 response where they talk about what have they done to
08:51:05 21 authenticate the prior art. They have identified images
08:51:09 22 that are currently available on the Tiefs website and are
08:51:12 23 claiming that those constitute prior art. And the way of
08:51:17 24 getting there is by having -- going to the internet archive
08:51:22 25 and printed out things from the internet archive and

08:51:29 1 claiming that the same images that they're seeing today are
08:51:33 2 the same images that were on websites, you know, about eight
08:51:37 3 years ago.

08:51:38 4 Now the problem is the internet archive did not
08:51:43 5 capture any of these images. They have file names they
08:51:47 6 claim are the same as some of these currently available
08:51:51 7 images, and based on that infer that the same images were
08:51:56 8 available eight years ago. And we object to that because
08:52:01 9 there is no witness in this case that can make that link.
08:52:07 10 They have done nothing to corroborate that assertion. There
08:52:12 11 is no -- there is just no witness that can testify about the
08:52:15 12 internet archive printouts. There is no witness that can
08:52:21 13 testify that the same images we're seeing today are in
08:52:26 14 existence or were modified from the ones that existed,
08:52:31 15 actually exist on the website in the non-prior art time
08:52:35 16 period. This is just speculation on their part.

08:52:37 17 Our issue even with the images that were
08:52:42 18 disclosed is that there is not -- this is really going to an
08:52:46 19 objection to their trial exhibit list. They're not going to
08:52:51 20 be able to lay a foundation to get any of these images into
08:52:54 21 evidence and we think it would be misleading and confusing
08:52:59 22 to the jury for them to suggest that any of these images are
08:53:02 23 actually prior art.

08:53:06 24 THE COURT: When did you get the pages from the
08:53:10 25 internet archives that have the file names on them? Were

08:53:16 1 those timely produced during discovery?

08:53:18 2 MR. HSU-HOFFMAN: Most of them were, Your Honor.

08:53:21 3 Most of them came I believe around the time of the
08:53:23 4 invalidity contentions. There are a couple of outliers that
08:53:27 5 were produced after the close of fact discovery, but that
08:53:32 6 kind of goes hand in hand with our objection to any of their
08:53:36 7 late produced materials, and there is a starting Bates range
08:53:41 8 that denotes that point as to whether the production was
08:53:46 9 late.

08:53:47 10 THE COURT: Let's hear from defendants.

08:53:51 11 Mr. Lobbin, it is the practice in this Court that you're
08:53:56 12 held to what's been disclosed in discovery.

08:53:58 13 MR. LOBBIN: As in most courts.

08:54:01 14 THE COURT: And the scheduling order here
08:54:03 15 required the defendants to give their invalidity
08:54:06 16 contentions. I guess my question is why are you not held to
08:54:09 17 the 24 references involving Tieks and the three patents
08:54:15 18 combined with those for obviousness?

08:54:18 19 MR. LOBBIN: Well, I don't have our document
08:54:20 20 production in front of us, but I do know what we submitted
08:54:24 21 to the Court. And we have got our references with Bates
08:54:28 22 labels that were produced to defendants last fall over six
08:54:32 23 months ago.

08:54:32 24 THE COURT: Right, but you have to tell --

08:54:34 25 MR. LOBBIN: Now our contentions --

08:54:36 1 THE COURT: Let me talk when I'm asking a
08:54:37 2 question.

08:54:37 3 MR. LOBBIN: Sure.

08:54:38 4 THE COURT: You have to tell them you're relying
08:54:40 5 on these; right?

08:54:41 6 MR. LOBBIN: Yes.

08:54:41 7 THE COURT: There is an invalidity contention
08:54:43 8 that is saying what are you planning to rely on for
08:54:47 9 invalidity, and now you're coming in and saying we gave all
08:54:50 10 this stuff back with the TRO, and we should be able to rely
08:54:53 11 on that, but you didn't even put a sentence in there that
12 says we may have relied on what we relied on for the TRO, so
08:55:00 13 how is it they're fairly on notice that you're going to rely
08:55:01 14 on anything else other than what you disclosed in those
08:55:04 15 contentions?

08:55:05 16 MR. LOBBIN: Well, I would say it's a matter of
08:55:08 17 timing. Certainly they're on notice at the TRO proceedings.
08:55:12 18 I think the TRO and the preliminary injunction proceedings a
08:55:15 19 year ago, they're on notice of what our invalidity
08:55:19 20 contentions were in that briefing. Subsequent to that we
08:55:23 21 provided the invalidity contention per the local rules
08:55:26 22 for --

08:55:26 23 THE COURT: It didn't include a number of
08:55:28 24 references that you now intend to rely on from the TRO;
08:55:32 25 right?

08:55:32 1 MR. LOBBIN: A few, yes. I don't think all the
08:55:34 2 numbers that he checked off there are correct. But suffice
08:55:39 3 it to say there was document production subsequent to the
08:55:43 4 invalidity contentions that included additional prior art
08:55:47 5 references, yes.

08:55:47 6 THE COURT: Did you supplement?

08:55:49 7 You understand if you just produce a piece of
08:55:52 8 prior art and you don't tell them ever, we're going to rely
08:55:56 9 on this, you don't have expert reports, so we weren't on
08:55:58 10 notice through an expert, you didn't supplement your
08:56:02 11 invalidity contentions, so how is it that just because in a
08:56:05 12 bunch of documents you send them a picture of a shoe they're
08:56:09 13 supposed to know that you're relying on that for invalidity?

08:56:13 14 MR. LOBBIN: I understand that. I understand
08:56:14 15 that. And you're right.

08:56:17 16 THE COURT: Okay. So let's talk about the issue
08:56:22 17 with respect to corroboration and how you are planning to
08:56:28 18 corroborate the dates of reference.

08:56:30 19 MR. LOBBIN: So Mr. Pichler is here, has been in
08:56:34 20 this business for many years, since before the critical
08:56:39 21 date.

08:56:39 22 THE COURT: And this business being what?

08:56:41 23 MR. LOBBIN: The shoe business, the orthotic
08:56:45 24 business, the fashion business, and so he's going to testify
08:56:50 25 at trial and he's going to corroborate the prior art status

08:56:55 1 of a number of shoes, physical shoes that will be here with
08:57:01 2 us at trial and have been disclosed in the proceedings and
08:57:04 3 been produced. These are shoes from the plaintiffs
08:57:10 4 themselves. These are also shoes from third parties.

08:57:13 5 And in addition to Mr. Pichler, who will be
08:57:17 6 testifying and authenticating those products, plaintiff will
08:57:23 7 have their own witness who may or may not know -- we didn't
08:57:28 8 have the budget to take depositions, so the plaintiff will
08:57:32 9 presumably have a witness who can be shown their own
08:57:35 10 product, prior art before the critical date and they will
08:57:41 11 say whatever they are going to say.

08:57:42 12 THE COURT: How are you going to get the date in
08:57:45 13 is my question? Mr. Pichler doesn't have in his head, here
08:57:50 14 is a shoe. Well, that's a 1972 shoe, right. How are you --
08:57:54 15 if you're going to show pictures of shoes, how are you going
08:57:59 16 to corroborate the date?

08:58:00 17 MR. LOBBIN: He's going to say I bought this in
08:58:03 18 2005.

08:58:04 19 THE COURT: Are you going to have receipts?
08:58:06 20 Have those things been produced?

08:58:08 21 MR. LOBBIN: I don't know whether the receipts
08:58:10 22 have been produced, but he's going to testify based on his
08:58:13 23 knowledge of the shoe.

08:58:14 24 THE COURT: But there are plenty of cases out
08:58:17 25 there that say an uncorroborated witness testimony is not

08:58:20 1 sufficient. You need something else. If you're telling me
08:58:23 2 I'm going to have a shoe and he's going to say I bought it
08:58:26 3 in 2005, trust me, there is plenty of case law that says
08:58:30 4 that's not sufficient. So we need more corroboration. So
08:58:34 5 what is your corroboration?

08:58:36 6 MR. LOBBIN: The testimony of the witnesses,
08:58:38 7 including plaintiff's witnesses. The documents themselves
08:58:41 8 that have dates on them.

08:58:43 9 THE COURT: Which documents have dates on them?
08:58:46 10 Because when I looked through the TRO papers and I looked at
08:58:50 11 a lot of the pictures that were cited in here, there are no
08:58:54 12 dates on them. So when you say dates on them, what are you
08:58:59 13 relying on?

08:59:00 14 MR. LOBBIN: Well, some of the documents have
08:59:02 15 dates on them. And, you know, I haven't prepared all of the
08:59:05 16 documents that we have produced for trial, but you know,
08:59:10 17 corroboration is going to come in the form of either
08:59:12 18 documentation or additional testimony from another witness,
08:59:18 19 or we'll request judicial notice of the fact that these
08:59:24 20 shoes have been around forever. A lot of the shoes that
08:59:27 21 will be presented at trial are properly the subject of
08:59:31 22 judicial notice and plaintiff's own witnesses, there is
08:59:35 23 going to be admissions. And they have been in this
08:59:38 24 business. They know what products are out there. They know
08:59:41 25 what their own products are. And if they deny, I would love

08:59:45 1 to have them deny knowing when their own products were
08:59:48 2 produced. I mean, the main prior art is their own products.
08:59:52 3 Precritical date products of Tieks that invalidate their own
08:59:57 4 patents and show that they didn't invent anything.

09:00:01 5 THE COURT: Okay. Response from the plaintiff.
09:00:13 6 Now, do you have whatever shoes he's talking about? Do you
09:00:18 7 know what they're talking about?

09:00:20 8 MR. HSU-HOFFMAN: I think that's part of the
09:00:22 9 problem, you know, we know of the Camper shoe. A lot of
09:00:28 10 this is things they found on the internet. If you go back
09:00:31 11 to their TRO filing, they had Exhibit A which they make
09:00:34 12 clear was things they just found on the internet.

09:00:37 13 THE COURT: I'm asking about actual shoes. He
09:00:38 14 said Mr. Pichler is going to testify I bought it in 2005.
09:00:43 15 Do you know what those exhibits are?

09:00:45 16 MR. HSU-HOFFMAN: No, we don't. And part of the
09:00:50 17 -- part of why I'm surprised to hear that because at his
09:00:53 18 deposition, Mr. Pichler told us that he became -- the
09:00:56 19 question was:

09:00:57 20 Question: If you became interested in ballet
09:01:00 21 flats in 2015, this is well after the patents were filed.

09:01:04 22 He said, Oh yeah, yeah, yeah, of course.

09:01:08 23 So as far as we know, the first time he started
09:01:11 24 looking at ballet flats was five years after the patents
09:01:14 25 were filed. We also asked him:

09:01:16 1 "Question: Did you keep any record of your
09:01:17 2 purchases of any shoes?

09:01:19 3 "Answer: No, at the time, no. As a matter of
09:01:22 4 fact, as I said, I lived in Austria, I had a different bank
09:01:27 5 account that is no longer valid and different cards. So no,
09:01:30 6 I didn't."

09:01:30 7 We don't know what shoes they can corroborate.
09:01:34 8 And based on his deposition testimony, he's not a percipient
09:01:37 9 witness. He doesn't have percipient knowledge of the ballet
09:01:41 10 flats in the priority time period.

09:01:45 11 THE COURT: What about the argument that they
09:01:47 12 can try to corroborate art through your witnesses?

09:01:54 13 MR. HSU-HOFFMAN: Well, our client, it's true,
09:01:59 14 we have made -- there was an early model Tieks shoe. Now,
09:02:06 15 there is a difference between -- we have the actual shoe
09:02:09 16 that's been produced, the actual early model Tieks shoe.
09:02:14 17 That's what our experts have looked at. That's what your
09:02:17 18 witnesses intend to testify about. That's fine, we don't
09:02:22 19 dispute that. When it comes to images, other images that
09:02:25 20 have been found on the web, that's where we have a problem.
09:02:28 21 That's where we don't think anybody is going to be able to
09:02:31 22 testify that what's on the website now is what's on the
09:02:36 23 website back before 2010. That's where the corroboration
09:02:40 24 falls apart.

09:02:41 25 So if they want to ask about other shoes that

09:02:47 1 our witnesses know about, I think that ends up being
09:02:50 2 dangerous territory because it risk confusing the jury that
09:02:54 3 there are other shoes out there that potentially, you know,
09:03:00 4 relate to these patents. And I don't think the suggestion
09:03:04 5 should be made lightly that, or the references to early
09:03:08 6 ballet flats should be thrown around this courtroom casually
09:03:12 7 because it really does cause -- it's going to cause some
09:03:15 8 confusion.

09:03:16 9 THE COURT: But these are shoes that your folks
09:03:18 10 know about, right? They sold their shoes, presumably they
09:03:22 11 know what they sold and when. So are you going to take a
09:03:25 12 position, what are you going to say about when you first
09:03:28 13 sold shoes that are used by the patent?

09:03:31 14 MR. HSU-HOFFMAN: You're talking about non-Tieks
09:03:33 15 shoes?

09:03:33 16 THE COURT: No, Tieks shoes.

09:03:35 17 MR. HSU-HOFFMAN: Tieks shoes. They're going to
09:03:37 18 testify there was an early model Tieks shoe.

09:03:40 19 THE COURT: If they testify about that, why
09:03:42 20 can't Mr. Lobbin or Mr. Stamoulis come in and start asking
09:03:48 21 them questions about other Tieks shoes?

09:03:51 22 MR. HSU-HOFFMAN: We don't have an objection to
09:03:53 23 that, Your Honor. We have an objection to them using images
09:03:56 24 that are from the website that we don't have that they have
09:04:00 25 done nothing to corroborate that they have just found on

09:04:03 1 their own.

09:04:04 2 THE COURT: And your position is that if they
09:04:06 3 have a picture, they can't ask your witness about that
09:04:09 4 picture and say do you recognize this as a Tieks shoe?

09:04:14 5 MR. HSU-HOFFMAN: I think that would be fine if
09:04:18 6 it was not shown to the jury until the witness recognized
09:04:22 7 it. And if that's your procedures for handling
09:04:26 8 authentication, I don't think we have an objection to that,
09:04:29 9 Your Honor.

09:04:29 10 THE COURT: When you say authentication, you're
09:04:33 11 saying that all the person would have to do is say do you
09:04:37 12 recognize that as a Tieks shoe and the person says yes, I
09:04:41 13 do, and then -- I'm trying to understand if you have two
09:04:46 14 different things, one authentication and one corroboration
09:04:49 15 of a particular date, or are you combining those two?

09:04:55 16 MR. HSU-HOFFMAN: I think the date has to be
09:04:57 17 recognized. I think the date has to be recognized.

09:05:00 18 THE COURT: So you're saying if they show
09:05:02 19 something and say is that a Tieks shoe and he says yes, and
09:05:06 20 they say isn't that a Tieks shoe from 2007, and he says, you
09:05:10 21 know, just sitting here looking at this without a date on
09:05:12 22 it, I can't tell you that, your position then is the jury
09:05:16 23 can't see that shoe?

09:05:19 24 MR. HSU-HOFFMAN: I think that's what we would
09:05:22 25 ask Your Honor because we have the actual shoe available

09:05:25 1 that was available in the prior art time period. We think
09:05:28 2 the confusion would result from them -- I think the next
09:05:31 3 step is that they take that and suggest that was actually in
09:05:34 4 the prior art.

09:05:39 5 THE COURT: What about their position that I
09:05:41 6 should a take judicial notice of what they found on the
09:05:44 7 internet?

09:05:45 8 MR. HSU-HOFFMAN: I think when the facts are
09:05:46 9 disputed there has not been an authentication, there is no
09:05:51 10 witness that's going to testify about the authenticity of
09:05:56 11 source code that they pulled from the archives, about the
09:05:59 12 printouts from the archives. Where we're disputing where
09:06:02 13 there is an issue about what images that were actually shown
09:06:06 14 on there, I don't think that's something to take judicial
09:06:09 15 notice of. The cases they cited reference taking judicial
09:06:14 16 notice of published patents as well as facts that were not
09:06:17 17 in dispute such as whether adhesive was sticky or not. I
09:06:24 18 think when we're in a different territory when there is a
09:06:26 19 dispute over what constitutes prior art and when stuff is
09:06:32 20 publicly available, that's not proper to take judicial
09:06:36 21 notice of.

09:06:37 22 THE COURT: Okay. One more question. Are you
09:06:39 23 objecting to the Camper shoe as properly disclosed art.

09:06:43 24 MR. HSU-HOFFMAN: The Camper shoe was not in
09:06:46 25 their invalidity contentions, so yes, we are objecting that

09:06:50 1 it was not properly disclosed.

09:06:52 2 THE COURT: Okay. Mr. Lobbin, what shoes are
09:06:56 3 you -- you mentioned some samples and said Mr. Pichler would
09:07:00 4 say he bought it whenever, what are you talking about?

09:07:03 5 MR. LOBBIN: Well, the Camper would be one, that
09:07:05 6 was certainly part of our successful opposition to the
09:07:09 7 preliminary injunction.

09:07:11 8 THE COURT: Do they have an actual shoe that
09:07:14 9 you're going to show the jury?

09:07:17 10 MR. LOBBIN: We do. Actually they have it and
09:07:21 11 we need it back, so I need that back.

09:07:22 12 THE COURT: When did you disclose that?

09:07:24 13 MR. LOBBIN: At a deposition in Miami in
09:07:27 14 December.

09:07:27 15 THE COURT: And tell me specifically for that
09:07:29 16 shoe how you would plan to corroborate its status as a prior
09:07:34 17 art.

09:07:35 18 MR. LOBBIN: Well, I'll have to review whether
09:07:41 19 we have documents to corroborate, but in addition to the
09:07:45 20 documents --

09:07:46 21 THE COURT: When you say documents to
09:07:47 22 corroborate --

09:07:49 23 MR. LOBBIN: Receipts.

09:07:49 24 THE COURT: Documents that have been produced?

09:07:51 25 MR. LOBBIN: Yes, correct.

09:07:52 1 THE COURT: Not a receipt that you go back and
09:07:54 2 find today?

09:07:55 3 MR. LOBBIN: No. No. No.

09:07:57 4 THE COURT: Okay. So let's assume that there is
09:07:59 5 no receipt that's been produced, how do you plan to
09:08:03 6 corroborate with documents?

09:08:05 7 MR. LOBBIN: So with both Mr. Pichler and
09:08:09 8 plaintiff's witness, or witnesses, I would ask them --

09:08:14 9 THE COURT: So if plaintiff's witness says I
09:08:20 10 don't know when this shoe was available.

09:08:22 11 MR. LOBBIN: Fine.

09:08:23 12 THE COURT: Which is fair. Do you think that's
09:08:26 13 corroboration, then, in addition to what Mr. Pichler says?
09:08:31 14 Because corroboration requires something other than one
09:08:34 15 witness's testimony. If you have a second witness who says
09:08:37 16 I don't know, is it your opinion that the don't know is
09:08:40 17 corroboration of the first.

09:08:41 18 MR. LOBBIN: No.

09:08:42 19 THE COURT: So if their witness says I don't
09:08:45 20 know, then you can't corroborate it; right?

09:08:49 21 MR. LOBBIN: Well, perhaps. Now, Mr. Pichler is
09:08:52 22 going to talk about the Camper shoe. He has a relationship
09:08:55 23 with the Camper shoe. He saw it. He bought it. He used it
09:09:00 24 in his development. There would be a lot of testimony about
09:09:03 25 it.

09:09:03 1 THE COURT: This will be all testimony.

09:09:05 2 MR. LOBBIN: I understand.

09:09:06 3 THE COURT: I'm asking you what else you have.

09:09:08 4 And you're saying he's going to say I bought it, I used it,
09:09:11 5 I saw it, I wore it, whatever, but I need to know what else
09:09:14 6 you have.

09:09:18 7 MR. LOBBIN: And there are website images that
09:09:21 8 were produced that have the date on it.

09:09:23 9 THE COURT: But just so I'm clear with what I
09:09:27 10 have heard, is it true that you have pictures that were
09:09:31 11 taken off the website currently, then you have from the
09:09:33 12 internet archives a file name, but no picture from something
09:09:39 13 that happened back in the appropriate time?

09:09:42 14 MR. LOBBIN: Correct.

09:09:43 15 THE COURT: And then you expect someone to say
09:09:45 16 well, the file name here is the file name here, ergo, even
09:09:50 17 though I don't have a picture from 2005, the shoe must be
09:09:55 18 the same picture, that's what you're going to do and you're
09:09:58 19 going to do that through Mr. Pichler?

09:10:00 20 MR. LOBBIN: No. That's a request for judicial
09:10:04 21 notice.

09:10:05 22 THE COURT: You haven't made a request for
09:10:07 23 judicial notice.

09:10:08 24 MR. LOBBIN: Well, I will.

09:10:09 25 THE COURT: And I'm not sure that that -- I'm

09:10:13 1 supposed to say I can tell that this witness -- this file
09:10:17 2 name -- I don't know enough about file names to know whether
09:10:20 3 or not you can have different images.

09:10:22 4 MR. LOBBIN: Understood.

09:10:24 5 THE COURT: So don't count on me giving you
09:10:27 6 judicial notice.

09:10:28 7 MR. LOBBIN: I understand.

09:10:29 8 THE COURT: So I'm still not sure I understand
09:10:32 9 how you're going to get some of this in.

09:10:36 10 MR. LOBBIN: So he will testify at length and if
09:10:40 11 this Court says that's not sufficient for corroboration of a
09:10:43 12 date --

09:10:44 13 THE COURT: He's not going to testify about it
09:10:46 14 at all unless you can tell me how you're actually going to
09:10:50 15 corroborate it correctly, otherwise that's prejudicial to
09:10:53 16 put before the jury and then say forget about that, I need
09:10:56 17 to understand and maybe you have to go back and tell me
09:10:58 18 specifically, look at the case law on corroboration of dates
09:11:02 19 of prior art and tell me how you're going to corroborate it.
09:11:05 20 I understand if you say I'm going to show it to other
09:11:09 21 people, I just want to know what's going to happen if those
09:11:12 22 people, and you can sort of mock it, but the jury could
09:11:16 23 believe that someone sitting on a stand looking at a shoe
09:11:20 24 might not know the specific date it was available.

09:11:23 25 So if the person doesn't know, I just need to

09:11:26 1 understand what your corroboration is going to be, or if at
09:11:32 2 that point I can say you don't have corroboration and we're
09:11:36 3 not going to put this in.

09:11:37 4 MR. LOBBIN: So Mr. Pichler's testimony is going
09:11:39 5 to be offered for many reasons in addition to prior art and
09:11:43 6 corroboration of a date. So I'm not sure how we separate
09:11:47 7 the two.

09:11:48 8 THE COURT: We're going to --

09:11:50 9 MR. LOBBIN: Certainly his development of the
09:11:52 10 product, the experience with what lead to the accused
09:11:55 11 infringing products is going to be part of his testimony for
09:11:59 12 the jury, who I am, what I did, what I looked at, what I
09:12:03 13 found, what I bought, what I wore, so that testimony is
09:12:08 14 going to be offered for purposes of our general defense to
09:12:13 15 the case.

09:12:13 16 Now, some of that testimony will also go to what
09:12:18 17 is prior art based on what he did with what before the
09:12:22 18 critical date. So I'm not sure that if he gives that
09:12:32 19 testimony we're going to be able -- well, you can tell me.
09:12:36 20 We're going to be able to say no, you can talk about what
09:12:39 21 you did in 2009, but you can't talk about specifically what
09:12:44 22 shoes you looked at and bought and handled because we don't
09:12:47 23 have a sales receipt even though that testimony is offered
09:12:52 24 for many other purposes.

09:12:54 25 THE COURT: Right. But if we have an

09:12:56 1 instruction to the jury that says is it anticipated, we
09:13:01 2 can't just say by Ticks generally, you have to tell them
09:13:04 3 what they're looking at. Okay? And any images that you're
09:13:08 4 going to suggest were anticipatory, you need to have
09:13:13 5 corroboration.

09:13:14 6 He can say yeah, I bought a shoe in 2005, but
09:13:17 7 that doesn't mean you're going to be able to rely on that as
09:13:21 8 prior art to invalidate their claims if you can't
09:13:25 9 corroborate the date, that's just part of his story that I
09:13:28 10 bought this shoe around that time.

09:13:30 11 MR. LOBBIN: Sure.

09:13:31 12 THE COURT: So I guess what I need to know is if
09:13:35 13 we assume that I'm going to allow you to rely on things that
09:13:40 14 were fairly disclosed, and that includes the 24 files that
09:13:44 15 were included in the invalidity contentions and the three
09:13:49 16 patents for obvious that combine with those for obviousness,
09:13:54 17 I need you to tell me how for each of the patents, I assume,
09:13:59 18 the patents are not an issue with respect to corroboration;
09:14:04 19 is that right?

09:14:05 20 MR. HSU-HOFFMAN: No, Your Honor, no issue with
09:14:07 21 the patents, Your Honor.

09:14:07 22 THE COURT: Okay. Is it all 24 of the files
09:14:10 23 that you have questions about?

09:14:13 24 MR. HSU-HOFFMAN: Yes, Your Honor.

09:14:14 25 THE COURT: So I guess I would like to know for

09:14:16 1 the 24 files how you're going to plan to corroborate and if
09:14:19 2 you are planning to use shoes, actual shoes, as prior art,
09:14:27 3 and those are fairly within what you're relying on in the
09:14:31 4 invalidity contentions, then I guess I need to know how you
09:14:37 5 are planning to corroborate those as well so I can rule on
09:14:42 6 this motion.

09:14:43 7 MR. LOBBIN: So our contention is at the very
09:14:45 8 least the prior art disclosed in the preliminary injunction
09:14:49 9 opposition as well as the invalidity contentions are --

09:14:52 10 THE COURT: No.

09:14:53 11 MR. LOBBIN: Okay.

09:14:54 12 THE COURT: You did not even bother to put a
09:14:56 13 single line in there that says oh, and we're relying on all
09:15:00 14 the stuff that we included in the TRO. So I think it's fair
09:15:04 15 and there are cases that plaintiff cited and you didn't cite
09:15:08 16 any in response to say that they could reasonably have
09:15:13 17 though you decided to drop that and rely on new art. I
09:15:17 18 think we're going to go with what you fairly disclosed in
09:15:20 19 the invalidity contentions.

09:15:22 20 MR. LOBBIN: Okay. I think it was a scrivener's
09:15:27 21 error. I don't think that's fair, particularly when they
09:15:30 22 deposed our client and asked all this stuff in the context
09:15:32 23 of prior art after the invalidity contention. They deposed
09:15:38 24 him on the invalidity contentions as well as preliminary
09:15:43 25 injunction --

09:15:43 1 THE COURT: Did you supplement?

09:15:44 2 MR. LOBBIN: We did not. They put us out of
09:15:46 3 business. This is a shoestring defense, Your Honor, and I
09:15:49 4 apologize, but they put us out of business with this
09:15:53 5 litigation. He's not even making any sales or any money in
09:15:56 6 the last year. We can barely -- if Your Honor continued
09:16:00 7 this case, we would just fold up tent. This is -- I'm not
09:16:03 8 getting paid. This is a labor of truth and love. And I'm
09:16:08 9 sorry, that needs to be said.

09:16:12 10 So yes, you're right, technically you're right,
09:16:15 11 my associate did not reference the preliminary injunction
09:16:18 12 papers in this contention. And he will hear about it. Is
09:16:20 13 it fair that they knew about the preliminary injunction
09:16:23 14 papers and knew that that was prior art that they were going
09:16:26 15 to rely, yes, it is. If you put them on the stand and have
09:16:29 16 them raise their hand, they would admit that. They're big
09:16:32 17 boys. They have done litigation before, we have all have.

09:16:35 18 This is not a case where scrivener's errors
09:16:39 19 should go to their benefit and to our detriment. We have a
09:16:42 20 case to present. There are millions of ballet flats since
09:16:45 21 the 1950's and I am going to ask witnesses what they are,
09:16:50 22 they are going to know, they are going to know when they
09:16:51 23 were, and the jury is entitled to know this is a crowded art
09:16:54 24 if there is any inventions here at all. And that's how I'm
09:16:57 25 going to corroborate what we have in our contentions. I'm

09:17:01 1 going to show them an image, I'm not going to show them the
09:17:04 2 internet file with a URL site and ask any witness to talk
09:17:09 3 about the URL. I'm going to show them a picture of an image
09:17:14 4 and say what is this? How do you know? When did you know
09:17:16 5 it? Oh, really, before the critical date? That's what the
09:17:19 6 other witness said, and that's what the other witness said,
09:17:22 7 that's what the other witness said. Great, that was around
09:17:25 8 and these forty-seven other shoes were around. And gosh,
09:17:28 9 now we have a patent on this. Okay. This looks a lot like
09:17:32 10 that and a lot like that and a lot like that and a lot like
09:17:36 11 that. Ladies and gentlemen of the jury, what invention do
09:17:37 12 we have, if we have any invention at all --

09:17:39 13 THE COURT: Okay. Okay. I get it. I get it.
09:17:42 14 And it's unfortunate that this case has taken such an
09:17:47 15 economic toll. But nevertheless, it hasn't settled, the
09:17:53 16 case is going forward, and I cannot let things go before the
09:17:58 17 jury that shouldn't be before a jury. And I get the feeling
09:18:02 18 that you just want to sort of make it up now at the end of
09:18:05 19 the case because it wasn't put forward before. And when you
09:18:09 20 say I'm going to show a picture and it's not a dated
09:18:12 21 picture, we're not talking about printed publications here
09:18:16 22 that have a date on them and everybody understands, you want
09:18:18 23 to show this that there is no date on, and have someone say
09:18:23 24 oh, looks 2007 to me. That's where I have a problem because
09:18:28 25 I have a problem with you putting that before the jury if

09:18:32 1 it's not appropriately corroborated. And if the
09:18:35 2 corroboration you're telling me is their witnesses plus
09:18:39 3 Mr. Pichler, I'll ask their position on that, but not -- but
09:18:47 4 it will not be Mr. Pichler alone that establishes that as
09:18:51 5 prior art, because the case law is clear that a single
09:18:53 6 witness cannot corroborate it.

09:18:56 7 MR. LOBBIN: Well, that's what we're going to
09:18:59 8 do.

09:18:59 9 THE COURT: No, you're not going to do it if I
09:19:01 10 don't let you do it.

09:19:03 11 MR. LOBBIN: Okay. It's not going to be a
09:19:05 12 single witness.

09:19:06 13 THE COURT: And so I just want to understand, if
09:19:09 14 you have other people who say I don't know the date, then if
09:19:15 15 you want me to still allow that in as prior art, you're
09:19:20 16 going to have to come up with some other corroboration.

09:19:26 17 MR. LOBBIN: Understood.

09:19:27 18 THE COURT: Okay. Now one issue that Mr. Lobbin
09:19:33 19 raised with respect to the preliminary -- you can sit down.
09:19:38 20 I would like to talk to plaintiff.

09:19:40 21 MR. LOBBIN: Thank you.

09:19:40 22 THE COURT: One issue that Mr. Lobbin raised
09:19:45 23 with respect to the TRO stuff, I understand we're still
09:19:49 24 going to have the corroboration issue, but why is it not
09:19:53 25 fair if you guys really did ask Mr. Pichler about that after

09:19:56 1 the invalidity contention, why not suggest that you kind of
09:20:00 2 knew that it was in the case?

09:20:02 3 MR. HSU-HOFFMAN: Because when we asked
09:20:03 4 Mr. Pichler about the Camper shoe, we asked him where did
09:20:07 5 you -- when did you first acquire these shoes. He said the
09:20:10 6 summer of 2015 at the store called Humanic, H-U-M-A-N-I-C,
09:20:18 7 like in China, Humanic, and I know exactly where it was, at
09:20:23 8 the Europark Shopping Center in Salzburg, Austria.

09:20:27 9 It's well after the patents were filed. It's
09:20:30 10 not in the U.S. That Camper shoe seemed to have gone --
09:20:34 11 seemed to be out of the case at that point after that
09:20:39 12 question.

09:20:39 13 So that's why we filed the motion in limine
09:20:43 14 because it wasn't based on their -- based on things that
09:20:49 15 they indicated to us, we weren't sure that they weren't
09:20:52 16 going to try to go there and suggest to the jury that things
09:20:55 17 they found on the web and what they were looking at with the
09:20:59 18 Camper shoe is a history of Camper shoes.

09:21:01 19 THE COURT: Is that the only TRO art that you
09:21:04 20 asked about during the deposition?

09:21:08 21 MR. HSU-HOFFMAN: There were -- I believe there
09:21:13 22 were some other shoes, that was the main focus of the
09:21:16 23 deposition because that's the shoe that he came forward
09:21:18 24 with. He actually appeared at the deposition with that
09:21:22 25 shoe. But that was the focus of that one.

09:21:26 1 The stuff in the TRO, like I said, was based on
09:21:29 2 stuff that they found on the internet, and that coupled with
09:21:32 3 the fact that he testified he first became interested in
09:21:36 4 ballet flats in 2015 confirmed to us that there wasn't
09:21:40 5 percipient knowledge of earlier ballet flat shoes that
09:21:45 6 Mr. Pichler had.

09:21:48 7 MR. LYONS: Your Honor, just to amplify that
09:21:50 8 point because I took that particular deposition. We relied
09:21:53 9 very heavily on their disclosure of invalidity. Mr. Pichler
09:21:57 10 referred to a lot of different things. He brought up the
09:22:00 11 Camper shoes, so we followed up, we confirmed it wasn't
09:22:03 12 prior art. He had never seen it in the prior art. He had
09:22:06 13 never seen any shoe in the prior art because he was not
09:22:08 14 interested in ballet flats until 2015.

09:22:11 15 We did not met methodically through their
09:22:15 16 disclosures from a year later. We focused on the
09:22:18 17 contentions they were making in this case. And I can tell
09:22:21 18 you with great confidence if they told us this is what we're
09:22:26 19 focusing on, we would have put our time and energy into
09:22:30 20 discovery on that, not just with Mr. Pichler, but our own
09:22:34 21 fact investigation about that shoe. We focused our case
09:22:37 22 around those contentions. Everybody does.

09:22:43 23 THE COURT: Okay. Mr. Lobbin, is Mr. Pichler
09:22:53 24 planning to say something different about the Camper shoe
09:22:56 25 than the 2015 date he gave at his deposition?

09:23:01 1 MR. LOBBIN: If I could confer.

09:23:06 2 THE COURT: Sure.

09:23:23 3 (Discussion off the record.)

09:25:10 4 MR. LOBBIN: So look, I understand their
09:25:18 5 argument, he bought it -- he may have bought it after the
09:25:22 6 critical date, okay, so that's -- his purchase of it is not
09:25:26 7 prior art. And they went into that at his deposition. And
09:25:30 8 they're relying on that to prove that the shoe, the actual
09:25:34 9 shoe is not prior art, was not in the public domain as of
09:25:38 10 the critical date, which is not true. And Mr. Pichler is
09:25:42 11 going to testify about not only his purchase, but his
09:25:46 12 knowledge of the shoe, his research into the shoe, some of
09:25:49 13 which, you know, may have some evidentiary issues. Their
09:25:53 14 witness has been in this business since before these patents
09:25:57 15 were filed. They know about the shoe as well as various
09:26:00 16 other prior art shoes.

09:26:01 17 And we have been through this discussion. So I
09:26:03 18 plan to ask their witness about. I plan to ask Mr. Pichler
09:26:07 19 what he did, when, what he has, has the shoe, show the shoe.
09:26:12 20 I didn't go to Mallorca and take a deposition of Camper and
09:26:18 21 provide their testimony through deposition to validate.

09:26:22 22 THE COURT: We don't need to be silly here. You
09:26:24 23 didn't need to go to Mallorca to do that. You could have
09:26:28 24 done that in a number of ways including by asking them
09:26:31 25 questions, interrogatories, or even taking a single

09:26:34 1 deposition of them on the issue. I understand what you're
09:26:39 2 planning to do.

09:26:39 3 Let me just ask you, do you agree that if your
09:26:46 4 witnesses were to recognize a particular shoe as being from
09:26:52 5 a particular time period that that would be sufficient
09:26:55 6 corroboration in addition to whatever Mr. Pichler says?

09:27:09 7 MR. HSU-HOFFMAN: I think, Your Honor, I think
09:27:11 8 if it's coupled with some documentary evidence and our
09:27:15 9 witnesses recognize both the shoe and the time period, I
09:27:21 10 don't think -- we don't have an objection.

09:27:22 11 THE COURT: What do you mean by documentary
09:27:24 12 evidence? You know what the documents are now. Are you
09:27:28 13 just telling me that and knowing that there is nothing that
09:27:30 14 you accept, or is there something that they could show you?

09:27:34 15 MR. HSU-HOFFMAN: I think, for example, if there
09:27:37 16 is an article that references the shoe.

09:27:38 17 THE COURT: Have any of those been produced that
09:27:40 18 you're aware of that they're relying on?

09:27:43 19 MR. HSU-HOFFMAN: There are some articles that
09:27:45 20 reference particular shoes, but I think that coupled with
09:27:49 21 the witnesses' testimony that they recognize that shoe would
09:27:53 22 have some firsthand knowledge of that being sold or
09:27:56 23 available in the prior time period, we don't have an
09:28:00 24 objection.

09:28:00 25 THE COURT: Okay. Well, I will issue an order

09:28:09 1 on this next while on the motion in limine number two, but I
09:28:14 2 think that brings us to motion in limine number one, which
09:28:18 3 is the testimony of Mr. Pichler and his wife. And when I
09:28:22 4 looked at the proposed jury instructions, documents that he
09:28:30 5 made it did not appear that Mr. Pichler's wife was a
09:28:34 6 witness. Is that issue done now?

09:28:38 7 MR. LOBBIN: I believe they listed -- I'm not
09:28:43 8 sure, maybe it didn't. She's not listed on our witness list
09:28:48 9 and she's not a witness.

09:28:50 10 MR. LYONS: If she's not a witness, then she's
09:28:53 11 not an issue, Your Honor. We had a concern if she was, but
09:28:56 12 if she's not, then --

09:28:59 13 THE COURT: This is plaintiff's position, so
09:29:01 14 I'll hear from plaintiff first on it.

09:29:08 15 MR. LYONS: So for this limine motion, Your
09:29:11 16 Honor, this is my Mike Lyons for plaintiff, the concern is
09:29:16 17 we don't have an expert report from Mr. Pichler, and our
09:29:22 18 only concern was just based on some of the comments we've
09:29:25 19 heard from counsel, it became clear to us that he may be
09:29:30 20 intending to give expert testimony on questions of patent
09:29:36 21 validity, patent infringement, trade dress infringement and
09:29:40 22 we didn't think that would be appropriate coming from a fact
09:29:43 23 witness. We do have expert witnesses who are going to
09:29:48 24 testify. They're experienced in this industry, in the
09:29:52 25 fashion marketing industry. They have got their own design

09:29:56 1 patents. They have got design experience. And they're well
09:29:59 2 qualified to provide expert opinion testimony.

09:30:04 3 Obviously Mr. Pichler can testify about his
09:30:07 4 percipient experiences, but I don't think that extends to
09:30:11 5 and should include opinions on whether the patents are valid
09:30:14 6 or over prior art, whether it qualifies for trade dress,
09:30:21 7 whether it's invalid. He has counsel, they're going to be
09:30:23 8 able to make arguments in light of the evidence that's
09:30:26 9 submitted. We just don't think it should come from a lay
09:30:30 10 witness and it shouldn't come from a lay witness who didn't
09:30:33 11 offer any expert report at all in this matter.

09:30:35 12 THE COURT: Is there an allegation of
09:30:37 13 willfulness in this case?

09:30:38 14 MR. LYONS: There is.

09:30:39 15 THE COURT: So Mr. Pichler should be able to get
09:30:42 16 up there and defend himself on willfulness, right, and say,
09:30:47 17 you know, I didn't think that we were using that patent
09:30:50 18 because of X, Y and Z. Do you have a problem with that?

09:30:55 19 MR. LYONS: Well, I think he can point out what
09:30:58 20 he believes are differences. He received a cease and desist
09:31:02 21 letter. He responded to that letter. He made certain
09:31:05 22 promises about things that he would do that he didn't follow
09:31:08 23 through on. You know, we would expect him to testify about
09:31:12 24 that. I think that's different from testifying that this is
09:31:18 25 an invalid patent and here is why, and I'm an expert and let

09:31:22 1 me tell you about the ordinary observer test and how one
09:31:27 2 exercises that. So I think there is some line drawing here.

09:31:32 3 He obviously should be given an opportunity to
09:31:34 4 get on the stand and talk about what he thought about as a
09:31:38 5 percipient witness when he was confronted with the evidence
09:31:42 6 of this infringement, but we don't think he should present
09:31:45 7 that as an expert testimony.

09:31:46 8 THE COURT: And what about, I understand that
09:31:50 9 there is a dispute as to when his relevant knowledge began,
09:31:55 10 2015, 2008, whatever, there is a dispute between you all.
09:32:08 11 Are you saying that he shouldn't be able -- let's assume his
09:32:14 12 knowledge goes back and you can cross-examine him on when
09:32:18 13 his knowledge actually began, but let's say he wanted to
09:32:22 14 testify on what he knew back in 2008, are you okay with that
09:32:25 15 if we're not talking about him calling it -- him opining
09:32:31 16 that something is prior art or him opining on the ultimate
09:32:37 17 issue of validity or something like that?

09:32:40 18 MR. LYONS: If he testifies about what he
09:32:42 19 personally knew in 2008 as a percipient witness, we'll
09:32:46 20 certainly impeach him. He testified very clearly at his
09:32:50 21 deposition that he began looking at ballet flats in 2015, so
09:32:54 22 he's not going to have detailed personal knowledge going
09:32:59 23 back. What he knows about 2018 is about research he did on
09:33:03 24 the internet and that gets into a lot of topics we just
09:33:07 25 discussed earlier about uncorroborated prior art.

09:33:11 1 Some of our concerns are him talking about well,
09:33:14 2 in 2015, I learned the following about what was going on in
09:33:18 3 2008 based on trolling around on the internet and finding a
09:33:23 4 picture or two or buying a shoe in 2015 and saying I'm sure
09:33:27 5 it's been around for a while. That's where our concern is.
09:33:31 6 But his actual experiences in 2018 as a percipient witness,
09:33:35 7 I believe he's entitled to testify about that, we're also
09:33:39 8 entitled to cross-examine him on that, but I think that's
09:33:42 9 all fair game.

09:33:43 10 THE COURT: Mr. Lobbin.

09:33:46 11 MR. LOBBIN: Thank you, Your Honor.

09:33:46 12 THE COURT: What is it that Mr. Pichler is going
09:33:49 13 to say? I agree that he should be able to talk about his
09:33:52 14 own experience, but if you're going to get into ultimate
09:33:59 15 issues, that means you expect him to opine the patents are
09:34:04 16 invalid, or just to talk about his experience with shoes
09:34:09 17 prior to the critical date.

09:34:12 18 MR. LOBBIN: Yes, Your Honor, that's exactly
09:34:15 19 what he will do.

09:34:17 20 THE COURT: I said or, so you got to tell me
09:34:19 21 which of the or.

09:34:20 22 MR. LOBBIN: What you said, the latter.

09:34:23 23 THE COURT: Okay.

09:34:23 24 MR. LOBBIN: So these issues obviously are legal
09:34:26 25 issues. Patent infringement as you know, Your Honor, lots

09:34:29 1 of experts, lots of stuff. He's an entrepreneur. Our
09:34:35 2 budget didn't allow for experts. We don't need experts.
09:34:38 3 We're going to be asking a jury to determine what would an
09:34:44 4 ordinary observer see as substantially similar. What would
09:34:48 5 likely -- what would be likely to confuse on trade dress.
09:34:53 6 We're asking the jury --

09:34:55 7 THE COURT: You're not going to ask Mr. Pichler
09:34:58 8 that, would someone be likely confused; right?

09:35:00 9 MR. LOBBIN: No.

09:35:01 10 THE COURT: And you're not going to ask him is
09:35:03 11 it infringed, you might ask him his perceptions of
09:35:07 12 differences between the shoes.

09:35:08 13 MR. LOBBIN: That's exactly right. That's
09:35:11 14 exactly right. The underlying fact that go into such a
09:35:16 15 determination from the perspective of an ordinary observer
09:35:21 16 which the jury is going to be asked to do.

09:35:23 17 THE COURT: He's not going to be asked what the
09:35:25 18 ordinary observer test is?

09:35:28 19 MR. LOBBIN: No. He doesn't know anything about
09:35:30 20 that. That's my job. And so as we put in our response to
09:35:32 21 the motion in limine, this is not a pharmaceutical case
09:35:35 22 where you need expert to battle the experts on infringement
09:35:39 23 and on validity. This is a case where we're talking about
09:35:42 24 shoes, we're talking about asserted trade dress, and the
09:35:46 25 jury is perfectly capable to judge what the witness says

09:35:50 1 about a product, what are the differences, what do you see,
09:35:53 2 differences between this and this. The jury can agree,
09:35:56 3 disagree, make their own determination. They're going to be
09:35:59 4 asked to do that anyway.

09:36:01 5 THE COURT: So I guess my question is in your
09:36:03 6 papers you said this isn't expert testimony under 702, it's
09:36:09 7 lay opinion under 701. But what you're describing to me
09:36:13 8 here is fact testimony. What is it that you expect to do
09:36:18 9 that's lay testimony because everything that you have just
09:36:21 10 said seems to be pretty much his experience and fact based?

09:36:26 11 MR. LOBBIN: Well, we could argue about whether
09:36:29 12 it's a fact or an opinion for a witness to say I see
09:36:33 13 similarities between this and that, I see differences
09:36:36 14 between this and that, have a jury observe them,
09:36:39 15 credibility. So I would say that's an opinion, the
09:36:42 16 differences between this and that, it's not a fact. Was the
09:36:47 17 light red, was the light green, that's a fact.

09:36:50 18 So a lay opinion, the rules of evidence
09:36:52 19 obviously allow for opinions that are based on the witness's
09:36:58 20 perception, based on the background and understanding. He
09:37:01 21 is an ordinary observer just like every juror. So the
09:37:07 22 jury's ultimate determination is going to be an opinion.
09:37:11 23 Infringement, that's an opinion.

09:37:11 24 THE COURT: I just want to make sure Mr. Pichler
09:37:14 25 is not going to be giving an opinion on infringement.

09:37:16 1 MR. LOBBIN: No, he's not going to say -- that
09:37:20 2 would be foolish for me to say, Mr. Pichler, you have
09:37:22 3 learned about infringement in this case and you know the
09:37:24 4 case law, you know, he's not qualified to do that. He is
09:37:29 5 qualified to say this is a shoe with these features, this is
09:37:32 6 a shoe with these features. Okay? And look at all the
09:37:36 7 other shoes with similar features. So that's what he's
09:37:44 8 going to testify, just the facts and lay opinions, not
09:37:47 9 expert opinions.

09:37:48 10 And one point of clarification. I'm looking at
09:37:51 11 pretrial order Exhibit 7, our witness list, we do have oddly
09:37:55 12 on it Geraldo, who is Mr. Pichler's wife, as a witness.

09:38:01 13 THE COURT: She is on that. She was not on the
09:38:03 14 witness list that was submitted with the preliminary jury
09:38:06 15 instructions and the jury instructions, so I don't know if
09:38:08 16 you're planning to call her or not, but if you are, we need
09:38:12 17 to discuss it. If you're not, then we don't.

09:38:14 18 MR. LOBBIN: The legal argument I just gave is
09:38:16 19 the same for her.

09:38:17 20 THE COURT: But it's not the same for disclosure
09:38:20 21 because they asked for her deposition and you said no.

09:38:22 22 MR. LOBBIN: Oh, oh, oh, okay. I understand the
09:38:25 23 issue. I wasn't clear. So she's on our witness list. She
09:38:29 24 did not get deposed because of scheduling issues. I think
09:38:35 25 their contention is that we somehow frustrated their ability

09:38:38 1 to get her deposition.

09:38:39 2 THE COURT: You said she has no relevance, knows
09:38:42 3 nothing about the issues and she doesn't work for the
09:38:44 4 company. That's what was said at least in the motion in
09:38:48 5 limine.

09:38:50 6 MR. LOBBIN: I don't remember saying that. Was
09:38:53 7 that on the phone? She's not part of the company, so that's
09:39:11 8 true.

09:39:22 9 THE COURT: Okay. This is what I have. In a
09:39:24 10 November 27th e-mail, counsel for defendants reiterated
09:39:29 11 their refusal to produce Ms. Geraldo for a deposition
09:39:34 12 claiming that, "Ms. Geraldo is not even an employee and
09:39:37 13 certainly she is not an officer or director of SM USA, nor
09:39:42 14 was she ever 'a managing agent.' She manages nothing
09:39:48 15 related to the business and has only done work for the
09:39:51 16 business on rare occasions as the wife of the principal,
09:39:55 17 nothing more. Her real job is being a wife and mother and
09:39:58 18 raising her young children."

09:40:00 19 So given that, how am I supposed to say they had
09:40:04 20 fair notice after they asked for her deposition and they
09:40:07 21 were told nope, she doesn't have anything relevant, that you
09:40:11 22 should be able to bring her in?

09:40:13 23 MR. LOBBIN: What you just read does not say, I
09:40:16 24 never deposed her, so I don't know what she may know that's
09:40:20 25 relevant. All I'm telling them is that she doesn't work for

09:40:24 1 the company. I choose my words carefully. I'm not tending
09:40:28 2 to mislead. And we had offered them dates for a deposition.
09:40:32 3 We offered them a date. They said no, that doesn't work for
09:40:35 4 us. We went back and forth.

09:40:37 5 This is a man who moved from San Diego, he and
09:40:41 6 Rianna moved from San Diego to Miami to Columbia, to
09:40:50 7 Columbia the country, to have the children in school.
09:40:51 8 They're back and forth here and there. We nailed down dates
09:40:54 9 for her deposition. And they said no, we're not going to do
09:40:56 10 that. It has to be this date. She was on a plane.
09:40:59 11 Literally I was back and forth 72 times trying to figure out
09:41:03 12 what date would work. I think we considered a Saturday.
09:41:06 13 Ultimately she flew to Columbia to be with her children.

09:41:10 14 They came to Miami to depose Mr. Pichler, and
09:41:14 15 they said -- I said look, she's not part of the company.
09:41:16 16 She's his wife. She certainly knows about, you know, what
09:41:21 17 he did, and what he's been doing, and she knows -- she's on
09:41:27 18 his website, her picture, the shoes. So it's not for me to
09:41:32 19 tell them how strenuously they may want to insist on getting
09:41:38 20 her deposition. We offered them her deposition.

09:41:45 21 MR. LYONS: So, Your Honor, Ms. Draun was not on
09:41:49 22 their initial disclosure list as anyone with relevant
09:41:53 23 evidence and what Your Honor read was a direct quote from an
09:41:57 24 e-mail to us from Mr. Lobbin that we received when we were
09:42:01 25 trying to schedule her deposition. And I'll add to that, we

09:42:06 1 were told she is gone. She's left the country for the
09:42:09 2 entire month of December, which was the last month of
09:42:14 3 discovery. And, you know, that emphatic discussion that she
09:42:20 4 basically knows nothing and implying that we're sort of
09:42:23 5 harassing his wife who has nothing to do with the case, we
09:42:27 6 obviously dropped it believing she had nothing to do with
09:42:30 7 the case at that point so we didn't pursue it, so we were
09:42:34 8 very surprised to suddenly see that she would be testifying
09:42:38 9 at trial, we haven't deposed her and we think that would be
09:42:41 10 an unfair surprise.

09:42:42 11 I did have one comment --

09:42:44 12 THE COURT: Did they give you a date for her
09:42:46 13 deposition that you said no?

09:42:48 14 MR. LYONS: They gave us a date. The sequence
09:42:52 15 was this. There was a date. We said we couldn't do that
09:42:55 16 date, can we schedule another. He said no. Within I think
09:42:59 17 forty-eight hours we came back and we said, fine, we'll do
09:43:03 18 your date. And that's when we got the message, she's out of
09:43:06 19 the country now. Too late. She's on a plane to Columbia.
09:43:10 20 She's gone. And we were told the entire month of December,
09:43:15 21 it's Christmas in Columbia, so she can't come back.

09:43:19 22 And just to add insult to injury on all this,
09:43:22 23 after we finally gave up on her deposition, she attended --
09:43:27 24 she showed up with Mr. Pichler at his deposition, and so she
09:43:31 25 hadn't left the country. That was just something they told

09:43:35 1 us. It was all just remarkable. But at that point I had
09:43:38 2 already -- you know, I had a flight out that evening and
09:43:42 3 there was no way to get her deposition done at that point.

09:43:45 4 THE COURT: And your position if I were to ask
09:43:48 5 that they should be deposed before trial?

09:43:50 6 MR. LYONS: Well, certainly we think the
09:43:52 7 appropriate resolution is that she not testify. I mean, if
09:43:56 8 she doesn't have relevant evidence, she simply is just being
09:44:00 9 put on the stand essentially to garner sympathy. That seems
09:44:05 10 to be what they want to use her for. We don't think that's
09:44:08 11 appropriate. If Your Honor is inclined to let her testify,
09:44:12 12 yes, we would ask that she be deposed before she takes the
09:44:15 13 stand.

09:44:16 14 THE COURT: Mr. Lobbin, what is your position on
09:44:19 15 that?

09:44:19 16 MR. LOBBIN: Mr. Pichler is tickling my ear to
09:44:23 17 put it lightly to say just a few short words if Your Honor
09:44:26 18 will allow about this subject.

09:44:29 19 THE COURT: Sure.

09:44:32 20 MR. LOBBIN: Please stand.

09:44:33 21 MR. PICHLER: Your Honor, my wife, she was part
09:44:37 22 of the business from beginning on. She had helped me. She
09:44:40 23 was part of me looking for a store. She was the person that
09:44:43 24 tried the shoes. She's gone with me through the entire
09:44:49 25 journey. She's frequently involved in every detail of it.

09:44:52 1 She doesn't work for the company. I don't work for the
09:44:53 2 company. The company got incorporated. We manage it as
09:44:57 3 owners, not employees. There is nobody on the payroll
09:45:00 4 because there was no money.

09:45:00 5 Her native language is Spanish. She speaks very
09:45:03 6 good English. She felt uncomfortable. She said I have no
09:45:07 7 problem with the deposition, you go first. I said
09:45:10 8 absolutely, no problem. We offered the date and we were in
09:45:14 9 San Diego from January to summer and from summer to fall we
09:45:17 10 were in Miami, all the time available. Only before
09:45:20 11 Christmas we had to go to Columbia to see our kids. They
09:45:24 12 were the entire year there.

09:45:24 13 They scheduled the deposition a week before we
09:45:28 14 had to leave. It was not enough. They could have deposed
09:45:31 15 her the entire year if they wanted to. And then when we
09:45:35 16 offered the dates, she literally had to fly leaving. When
09:45:40 17 my deposition was scheduled, I asked, can you please change
09:45:43 18 the flight and go with me, and she said I will change the
09:45:47 19 flight but I have to go back because my sister is taking
09:45:50 20 care of the kids. She came with me. And had they given her
09:45:54 21 the dates after that, she would have done it. They were
09:45:56 22 very inflexible to changing the dates, that's why she
09:46:00 23 couldn't, not because she didn't want to, she wanted to.

09:46:03 24 THE COURT: We do have disclosure rules in this
09:46:05 25 Court. She was not listed on the disclosure. I don't think

09:46:08 1 there was a dispute about that. But my question was what
09:46:12 2 was your position on whether she should be deposed now
09:46:15 3 before trial?

09:46:16 4 MR. LOBBIN: Well, I think that they can depose
09:46:24 5 her, certainly. She's in Miami?

09:46:30 6 MR. PICHLER: Yes.

09:46:30 7 MR. LOBBIN: They can depose her next week.

09:46:37 8 THE COURT: Okay. I'll think about that. And
09:46:42 9 your position is she's going to testify on what?

09:46:46 10 MR. LOBBIN: She's going to testify about the
09:46:54 11 shoes, the Massini shoes, what they do, how they -- what the
09:47:01 12 aspect of the design are, how they feel, what the purpose of
09:47:04 13 them is. This is an orthotic shoe, much different purpose
09:47:09 14 than their shoes, so there are distinctions in form,
09:47:13 15 function, everything about these shoes. They're not a copy
09:47:17 16 as they're alleged. They're not even in the same market,
09:47:21 17 really, submarket, so she's going to testify as, you know,
09:47:25 18 as the wife of the owner, someone who wears the shoes,
09:47:30 19 somebody who has helped in the advertising of the shoes, to
09:47:35 20 help inform the jury about what these shoes are all about.

09:47:40 21 THE COURT: Okay. I'll think about that and
09:47:42 22 issue that with my order on the other motion in limine.

09:47:52 23 Other issues from the pretrial order. The
09:47:59 24 untimeliness of defendant's pretrial disclosures, can we get
09:48:04 25 past that given that I have given plaintiff extra time to

09:48:07 1 deal with those?

09:48:09 2 MR. HSU-HOFFMAN: Yes, Your Honor.

09:48:10 3 THE COURT: Plaintiff's proposal not to assert
09:48:13 4 United States Design Patent D761536. So as I understand it,
09:48:21 5 there are counterclaims involving that, and so it seems like
09:48:26 6 defendant's position is correct that you can't just drop it
09:48:30 7 without their consent or without something, what is it that
09:48:35 8 you plan to do with that patent?

09:48:38 9 MR. LYONS: Well, Your Honor, I think if they
09:48:40 10 are going to go forward, I think maybe we'll just present it
09:48:43 11 as part of our case. We were trying to streamline things,
09:48:47 12 but if they won't agree to drop it, maybe we'll just assert
09:48:51 13 it.

09:48:52 14 THE COURT: And Mr. Lobbin, is that what you
09:48:54 15 prefer?

09:48:58 16 MR. LOBBIN: Your Honor, I think we'll be fine
09:49:02 17 with them dropping it. We'll drop our counterclaim.

09:49:06 18 MR. LYONS: All right.

09:49:07 19 THE COURT: So you guys submit me a stipulation
09:49:11 20 that deals with that.

09:49:11 21 MR. LYONS: We will, Your Honor.

09:49:13 22 THE COURT: Great. Thank you, both.

09:49:15 23 We have an issue in paragraphs 33 to 45 about
09:49:22 24 documents on the exhibit list that were never produced or
09:49:26 25 were untimely. And some of that I think we have discussed

09:49:30 1 with respect to the prior art. Is there anything in
09:49:38 2 addition that I need to deal with that's raised in those
09:49:42 3 paragraphs?

09:49:44 4 MR. LYONS: Yes, Your Honor. As you know, there
09:49:46 5 has been a lot -- a lot that's been produced after the close
09:49:50 6 of discovery. Some that we saw for the first time when we
09:49:55 7 got their trial exhibits. Some of it is related to prior
09:49:58 8 art. Some of it is related to other matters. It's our view
09:50:03 9 that defendants should not be able -- shouldn't be able to
09:50:07 10 put on their list anything that they have produced after the
09:50:10 11 close of discovery.

09:50:11 12 THE COURT: The problem I have with that one is
09:50:14 13 that we had a discovery conference after the close of
09:50:16 14 discovery where I did ask them, or order them to produce
09:50:21 15 certain documents. Mr. Pichler didn't become a defendant
09:50:28 16 until after the close of fact discovery, so I'm with you on
09:50:32 17 anything that you got the first time with the pretrial
09:50:35 18 order, that seems far too late, but the end of discovery
09:50:39 19 which was in December when a substantial amount was done
09:50:42 20 after January, I'm just not sure that that is --

09:50:46 21 MR. LYONS: I guess our view on that, Your
09:50:49 22 Honor, would be that we came to the Court asking for
09:50:52 23 additional documents, and the Court agreed that they should
09:50:55 24 be produced. So we think as plaintiff we should be able to
09:50:58 25 rely on them. That was why they were being produced. But

09:51:03 1 for defense to fail to produce them finally during the
09:51:07 2 discovery period, produce them later and then rely in their
09:51:11 3 own defense, obviously if we put them on our list, they're
09:51:16 4 entitled to use them as well, but for them to be able to
09:51:19 5 produce them late and then rely upon them, there is some
09:51:23 6 unfairness there.

09:51:24 7 THE COURT: I think what I have said before with
09:51:26 8 respect to validity, they can rely on the 24 Tiek's
09:51:32 9 references they disclosed, and again, this is assuming
09:51:37 10 corroboration. I'm just talking about disclosure, the 24
09:51:41 11 references plus the three obviousness references.

09:51:45 12 What I can't tell is what else, if the other
09:51:52 13 stuff isn't included, is there anything -- I don't know what
09:51:57 14 else is left that you're objecting to on timeliness. So if
09:52:00 15 I say to you anything that's prior art we have a limited
09:52:09 16 universe. Anything that was disclosed for the first time in
09:52:11 17 the pretrial order that they gave you is too late. What is
09:52:14 18 the universe that's left that you're objecting to that came
09:52:19 19 after discovery?

09:52:20 20 MR. LYONS: Your Honor, I would have to go back
09:52:23 21 and check what that is.

09:52:23 22 THE COURT: If you could let me know sort of
09:52:26 23 like I asked defendants just so that I have some idea of
09:52:29 24 what we're talking about so I know is this something I need
09:52:32 25 to rule on before trial or if it's two or three exhibits, we

09:52:35 1 don't need to deal with it and we'll see if they put them on
09:52:39 2 the list to use with witnesses.

09:52:41 3 MR. LYONS: Understood fully, Your Honor.

09:52:44 4 THE COURT: Okay. Now I wanted to talk about a
09:52:55 5 little bit about the trial logistics and the number of hours
09:52:58 6 for trial. I am going to -- I have dismissed the
09:53:05 7 counterclaims, so I am going to say each side will have ten
09:53:09 8 hours total for trial, and that includes the opening and
09:53:13 9 closing, however you want to allocate your time.

09:53:18 10 I do not charge time for voir dire of the panel
09:53:25 11 unless it becomes excessive at which time I'll give you a
09:53:30 12 warning and tell you I will plan to start charging time for
09:53:33 13 voir dire.

09:53:33 14 With respect to voir dire, we have pretty
09:53:40 15 limited voir dire in this court. What we typically do is we
09:53:45 16 have the panel back there, I will ask them a series of
09:53:48 17 questions. Anyone who answers affirmatively to those
09:53:52 18 questions we will bring back into chambers and talk. We
09:53:55 19 will talk mainly about their issues and whether or not if
09:53:59 20 they raised issues for being excused for cause. We don't
09:54:03 21 get into, you know, substantive discussions about things
09:54:07 22 outside of those issues that have been raised.

09:54:10 23 I do charge time for the preemptory strikes, so
09:54:15 24 that's when you'll start being on the clock.

09:54:19 25 Trial days will run from 9:00 a.m. to 4:30 p.m.,

09:54:28 1 sometimes 4:45 if the jury prefers. We'll have a 15-minute
09:54:33 2 break in the morning, a lunch break for about an hour, and a
09:54:36 3 15-minute break in the afternoon.

09:54:38 4 I am generally disinclined to close the
09:54:40 5 courtroom. And I'm not sure that there are any issues here
09:54:44 6 that would mandate that, but if there are, I would ask you
09:54:47 7 to give me a heads up about that so we can discuss it and
09:54:50 8 figure out if it's appropriate to close the courtroom.

09:54:54 9 Deposition designations, I understand that there
09:54:58 10 will be no disputes about deposition designations because
09:55:03 11 defendants have no testimony designated, and they offered no
09:55:08 12 counter-designations to plaintiff. And defendants did not
09:55:12 13 object in the pretrial order to any of Gavrieli's
09:55:15 14 designations. So there is a paragraph about how we'll deal
09:55:19 15 with those disputes, but I don't see how any of those
09:55:23 16 disputes could possibly be not waived.

09:55:27 17 No exhibits will be admitted without a witness.
09:55:38 18 For timeliness to objections to exhibits -- hold on one
09:55:50 19 second.

09:55:52 20 (Discussion off the record.)

09:56:06 21 THE COURT: So we have timeliness as an issue.
09:56:09 22 I'm going to try to rule on that. Hopefully we can minimize
09:56:14 23 that with the order that I have given. But if there are
09:56:18 24 continued timeliness objections to exhibits, the losing
09:56:21 25 party is going to be charged the time necessary for the

09:56:25 1 Court to hear and resolve the objections.

09:56:27 2 Objections to exhibits used on cross will be
09:56:31 3 addressed at the time that they are used. And the losing
09:56:35 4 party will be charged with time to resolve the objection.
09:56:39 5 Defendants did not object to any of Gavrieli's exhibits in
09:56:42 6 the pretrial order so I don't think that there should be any
09:56:45 7 objections to exhibits going that direction.

09:56:49 8 If there is an objection to any exhibits that
09:56:55 9 are offered for use with a particular witness, if the
09:57:02 10 parties are unable to reach an agreement after meeting and
09:57:05 11 conferring, they must e-mail my judicial administrator,
09:57:12 12 Diana Welham, by 7:30 a.m. on the day the witness is to
09:57:16 13 testify. And we will then come in a little bit early before
09:57:18 14 the jury gets here and see if we can work out the objections
09:57:25 15 or I rule them.

09:57:26 16 Juror notebooks, I understand that Gavrieli is
09:57:29 17 preparing the notebooks and they'll be ready on the first
09:57:31 18 day. Consistent with the Court's procedures, the party
09:57:38 19 shall provide a completed AO Form 187 exhibit list to the
09:57:43 20 courtroom deputy on the first day of trial.

09:57:45 21 With respect to moving around the courtroom, I
09:57:48 22 ask you not to encroach on the jury's space. If you want to
09:57:54 23 approach a witness, you just need to ask the first time and
09:57:59 24 after I have granted leave, if you need to approach that
09:58:02 25 witness again, that's fine, you're free to do that. And

09:58:06 1 you're free once you have asked permission once, you're free
09:58:10 2 to move this way in the courtroom, it's just the jury gets
09:58:13 3 uncomfortable with people getting too close to it. So over
09:58:17 4 here I will limit it to just you moving, coming up to hand
09:58:21 5 something to a witness.

09:58:23 6 The parties may have access to the courtroom on
09:58:27 7 the afternoon of April 26th, 2019 to set up for trial
09:58:34 8 starting at two clock. And if you have any questions, you
09:58:38 9 can coordinate that with my chambers.

09:58:40 10 We're still taking a look at the proposed jury
09:58:43 11 instructions that were submitted to us, but at the very
09:58:48 12 least they'll need to be revised in light of my rulings
09:58:52 13 today on the counterclaims, so I would ask that the parties
09:58:58 14 submit a revised set of jury instructions in the next week
09:59:04 15 or so.

09:59:06 16 Okay. Are there issues in the pretrial order or
09:59:10 17 questions that you have about my procedures that I have not
09:59:13 18 addressed?

09:59:18 19 MR. HSU-HOFFMAN: Your Honor, we have one issue
09:59:20 20 relating to the stipulated facts if we may be heard.

09:59:23 21 THE COURT: I'm not going to agree that we make
09:59:28 22 them stipulate to facts that you propose. I saw what you
09:59:33 23 had proposed in Exhibit 1, and you're going to be set to
09:59:38 24 prove any of those that you think need to be proved.

09:59:40 25 MR. HSU-HOFFMAN: The reason we identified those

09:59:44 1 facts is because they were admitted in response to the Soto
09:59:50 2 USA answer. These were facts that we saw as undisputed
09:59:53 3 throughout this case and probably should be part of the
09:59:57 4 stipulated list of facts, but we understand your -- there
10:00:01 5 will be plenty of time to do that at trial.

10:00:03 6 THE COURT: The way it was set out there
10:00:06 7 required me to do a lot of counter-referencing and figuring
10:00:09 8 out what you were talking about, and I'm not going -- I
10:00:12 9 don't have time to do that. So I'm not going to force them
10:00:15 10 to agree to things that they did not agree to.

10:00:18 11 MR. HSU-HOFFMAN: Thank you, Your Honor.

10:00:18 12 THE COURT: If you want to point out at some
10:00:20 13 point that it's in the answer, you're free to do that.

10:00:23 14 Okay. Mr. Lobbin.

10:00:25 15 MR. LOBBIN: Thank you, Your Honor. A question
10:00:27 16 about witnesses and recalling or rebuttal case. So
10:00:31 17 Mr. Pichler obviously is a key witness for us. They took
10:00:35 18 his deposition. He'll be here, so they're going to call him
10:00:39 19 I assume on their case in chief. When I have redirect, am I
10:00:43 20 also at that time presenting my facts in support after
10:00:49 21 affirmative defenses, or do I recall him later when they
10:00:53 22 rest their case? Did I miss something?

10:00:57 23 THE COURT: That's a very good question.

10:00:59 24 MR. LYONS: Well, I can clear this one up.

10:01:02 25 Mr. Pichler is a 30(b)(6) witness. We're entitled to play

10:01:06 1 deposition testimony as 30(b)(6) testimony. We don't intend
10:01:11 2 to call him live in our case, so if he wants to testify
10:01:14 3 live, they can call him as a witness when they think it's
10:01:18 4 appropriate.

10:01:19 5 THE COURT: Does that work for you?

10:01:21 6 MR. LOBBIN: Sure.

10:01:22 7 How about other witnesses, are we going to have
10:01:26 8 them hang around so that I can call them on my rebuttal
10:01:29 9 case, or do we examine them, for example, their witness,
10:01:33 10 they're going to call their witness, do I then --

10:01:35 11 THE COURT: You got to give me names. I don't
10:01:37 12 know who you're talking about.

10:01:38 13 MR. LOBBIN: Mr. Gavrieli.

10:01:42 14 MR. LYONS: I don't believe he's on their
10:01:46 15 witness list. We're going to call Mr. Gavrieli to testify.
10:01:52 16 And he'll be cross-examined. I'm not sure I understand the
10:01:55 17 question.

10:01:56 18 MR. LOBBIN: Well, our witness list says that --
10:02:05 19 we specifically reserve the right to call live as a witness
10:02:08 20 at trial any witness called live by plaintiff or any witness
10:02:15 21 presented on plaintiff's witness list. We don't recreate
10:02:18 22 their list.

10:02:19 23 MR. LYONS: First of all, there is another
10:02:20 24 question with Mr. Gavrieli. He is the company rep. He's
10:02:24 25 going to be here for the whole trial, so if we're just

10:02:27 1 talking about Mr. Gavrieli, he'll be here and they can call
10:02:30 2 him in their case in chief if they choose to.

10:02:34 3 THE COURT: Okay. I don't want this to become a
10:02:37 4 thing where every single witness is deposed twice because I
10:02:41 5 think that's unfair to the jury and inefficient use of the
10:02:44 6 jury's time. Why don't you all confer on who you want to
10:02:48 7 call and who versus who you just want to depose, and try and
10:02:56 8 come up with a proposal for how we're going to do this in an
10:03:00 9 efficient manner. There may be people, Mr. Pichler doesn't
10:03:05 10 sound like it's going to be an issue, maybe Mr. Gavrieli who
10:03:09 11 is going to be here the whole time, maybe that makes sense
10:03:12 12 if it's going to interrupt the flow of the testimony, but
10:03:17 13 for the most part, I would like to see people up here once.

10:03:21 14 MR. LOBBIN: That would be my proposal, Your
10:03:24 15 Honor. For instance, Mr. Gavrieli, if they're going to ask
10:03:27 16 him certainly about their case, they're not going to talk to
10:03:30 17 him about prior art and things like that, so I would propose
10:03:34 18 that I just ask my questions while he's up there instead of
10:03:37 19 calling him two days later.

10:03:38 20 THE COURT: That was the one where I just said
10:03:40 21 that one might make sense since he's going to be here the
10:03:45 22 whole time and since it might interrupt the flow of things
10:03:49 23 we could do it in two separate sections, especially since we
10:03:53 24 are talking about infringement positions in the plaintiff's
10:03:55 25 case and invalidity in the defendant's case, but for other

10:03:58 1 people see if you can work it out.

10:04:00 2 MR. LYONS: Thank you, Your Honor.

10:04:00 3 THE COURT: Anything else?

10:04:02 4 MS. DUDASH: Just one other issue. You talked
10:04:04 5 about objections. And we read your procedures, but if there
10:04:07 6 is an objection to something a witness says, hearsay, other
10:04:11 7 kinds of objections, should we just stand up and say
10:04:14 8 objection? Should we give a rule number in front of the
10:04:17 9 jury? How would you like us to handle that?

10:04:20 10 THE COURT: I think you can stand up and say
10:04:23 11 objection, you can give me a rule number if you want, you
10:04:26 12 can say hearsay, but I don't want long objections that might
10:04:32 13 influence or prejudice the jury.

10:04:35 14 MR. LYONS: You know, there is one more
10:04:37 15 question. So Mr. Gavrieli will be the corporate
10:04:40 16 representative. He's also going to testify. I know usually
10:04:44 17 the fact witnesses are sequestered. I wonder if there would
10:04:50 18 be an exception for Mr. Gavrieli since it's his company, we
10:04:54 19 hope he would be able to attend the entire trial.

10:04:57 20 THE COURT: I assume you wouldn't have an
10:04:59 21 objection for reciprocity for Mr. Pichler?

10:05:02 22 MR. LYONS: No, Your Honor.

10:05:02 23 THE COURT: Any objection?

10:05:03 24 MR. LOBBIN: No objection.

10:05:04 25 THE COURT: I think as a matter of course in our

10:05:06 1 district, corporate representatives are excluded from the
10:05:11 2 sequestration orders, but given that there are no
10:05:13 3 objections, Mr. Gavrieli and Mr. Pichler may attend the
10:05:18 4 entire trial.

10:05:18 5 But if Ms. Geraldo testifies, she would be
10:05:25 6 sequestered from the trial until the time of her testimony.

10:05:29 7 MR. LOBBIN: Understood.

10:05:31 8 THE COURT: Okay. Any other questions?

10:05:37 9 MR. LYONS: None from plaintiff, Your Honor.

10:05:39 10 THE COURT: Thank you very much.

10:05:39 11 (Court recessed at 10:05 a.m.)

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